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Supreme Court of the United States

OCTOBER TERM, 19[redacted]63

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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April 1960

INDEX

	Page
The Judgment and Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statement	3
Reasons for Granting the Writ	12
Reasons for Summary Reversal	16
Summary of Argument	17
Argument	20
I. The Extradition Judge, or the Court in Which He Sits, Has the Power to Issue a Subpoena	20
A. The function of the extradition judge is judicial in nature	20
B. The extradition judge has a power of subpoena under 28 U.S.C. § 1651	24
C. In any case the United States District Court has the power to issue a subpoena in aid of the jurisdiction of the judge	29
D. The extradition statute and Treaty presuppose a subpoena power in an extradition case	31
II. Service of a Subpoena in an Extradition Case Is Not Limited to 100 Miles from the Place of Hearing	37
III. The Depositors Can Advance No Ground to Quash the Subpoenas	41
Conclusion	43
Appendix 1–Statutes and Treaty Provisions Involved.	
Appendix 2–Orders of the United States District Court for the Southern District of Florida, Miami Division.	
Appendix 3–Orders, Opinion, and Judgment of the United States Court of Appeals for the Fifth Circuit.	
Appendix 4–Excerpts from Published Materials Dealing with Marcos Perez Jimenez.	
Appendix 5–Excerpts from proceedings of the Juridical Committee and Executive Committee of the 48th Conference of the Interparliamentary Union.	

CITATIONS

Cases: Page

American Lithographic Company v. *Werckmeister*, 221 U.S. 603 ..... 14, 18, 19, 25, 26, 38
Bank of the Republic v. *Millard*, 10 Wall. 152 42
Benge v. *Michigan National Bank*, 341 Mich. 441, 67 N.W. 2d 721 (1954) 43
Benson v. *McMahon*, 127 U.S. 457 ..... 22, 26, 27, 35
Bethlehem Shipbuilding Corporation v. *National Labor Relations Board*, 120 F.2d 126 (1st Cir. 1941) 18, 20
Bowles v. *Shawano Nat. Bank*, 151 F.2d 749 (7th Cir. 1945), *certiorari denied*, 327 U.S. 781 ..... 16, 43
Calamita v. *The Tradesmens Nat. Bank*, 135 Conn. 326, 64 A.2d 46 (1949) 43
Charlton v. *Kelly*, 229 U.S. 447 ..... 22, 26, 35
Collins v. *Loisel*, 259 U.S. 309 35
Collins v. *Loisel*, 262 U.S. 426 24
Cooley v. *Bergin*, 27 F.2d 930 (D. Mass. 1928) 42
Factor v. *Laubenheimer*, 290 U.S. 276 ..... 14, 15, 19, 27, 39
Falsone v. *United States*, 205 F.2d 734 (5th Cir. 1953), *certiorari denied*, 346 U.S. 864 ..... 16, 43
Foster v. *United States*, 265 F.2d 183 (2d Cir. 1959), *certiorari denied*, 360 U.S. 912 ..... 15, 42
Grin v. *Shine*, 187 U.S. 181 26
In re Kaine, 14 How. 103 24
Kamen Soap Products Co. v. *United States*, 110 F. Supp. 430 (Ct. Cl. 1953) 18, 19, 25, 38
In re Lo Dolce, 106 F. Supp. 455 (W.D.N.Y. 1952) 35
McMann v. *Securities and Exchange Commission*, 87 F.2d 377 (2d Cir. 1937), *certiorari denied*, 301 U.S. 684 ..... 16, 42, 43
National Mutual Insurance Co. v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582 21
Overby v. *United States Fidelity and Guaranty Company*, 224 F.2d 158 (5th Cir. 1955) 43
Ross v. *Knott*, 13 F. Supp. 963 (N.D. Fla. 1936), *affirmed*, 87 F.2d 817 (5th Cir. 1937), *affirmed sub nom. McNair* v. *Knott*, 302 U.S. 369 42
Schutte & Koerting Co. v. *Fischer & Porter Co.*, 6 Fed. Rules Serv. 45b.413, Case 2 (E.D. Pa. 1942) 42
Shepherd v. *Castle*, 20 F.R.D. 184 (W.D. Mo. 1957) 42
Societe Internationale v. *McGranery*, 111 F. Supp. 435 (D.D.C. 1953), *affirmed with modification sub nom. Societe Internationale* v. *Brownell*, 225 F.2d 532 (D.C. Cir. 1954), *certiorari denied*, 350 U.S. 937 ..... 16, 43
United States v. *Bryan*, 339 U.S. 323 41
United States v. *First Nat. Bank of Mobile*, 295 Fed. 142 (S.D. Ala. 1924), *affirmed per curiam*, 267 U.S. 576 42

Page

United States v. *Peoples Deposit Bank & Trust Co.*, 112 F. Supp. 720 (E.D. Ky. 1953), *affirmed*, 212 F.2d 86 (6th Cir. 1954) (adopting opinion of District Court), *certiorari denied*, 348 U.S. 838 ..... 15, 42
The United States, Petitioner, 194 U.S. 194 ..... 18, 30, 31
United States v. *Terminal R. Ass'n of St. Louis*, 148 Fed. 486 (E.D. Mo. 1906) 42
United States v. *Tom Wah*, 160 Fed. 207 (N.D.N.Y. 1908), *affirmed*, 163 Fed. 1008 (2d Cir. 1908) 18, 31
United States ex rel. Austin v. *Williams*, 6 F.2d 13 (E.D. La. 1925), *affirmed*, 12 F.2d 66 (5th Cir. 1926) 35
United States ex rel. Klein v. *Mulligan*, 1 F. Supp. 635 (S.D. N.Y. 1931), *affirmed*, 50 F.2d 687 (2d Cir. 1931), *certiorari denied*, 284 U.S. 665 35
United States ex rel. Oppenheim v. *Hecht*, 16 F.2d 955 (2d Cir. 1927), *certiorari denied*, 273 U.S. 769 35
In re Upham's Income Tax, 18 F. Supp. 737 (S.D.N.Y. 1937) 42
Williams v. *United States*, 289 U.S. 553 ..... 18, 21
Zimmermann v. *Wilson*, 105 F.2d 583 (3d Cir. 1939) 15, 42

Constitution and Statutes:

Constitution of the United States 13, 18, 20, 21, 24
Section 14, Act of September 24, 1789, 1 Stat. 81 25
Section 6, Act of March 2, 1793, 1 Stat. 335 40
Rev. Stat. § 716 (1875) 25
Rev. Stat. § 724 (1875) 38
Section 13, Act of September 13, 1888, 25 Stat. 479 ..... 30, 31
Section 262, Act of March 3, 1911, 36 Stat. 1162 25
18 U.S.C. § 3184 (1948) 2, 3, 12, 13, 18, 20, 21, 23, 24, 40
18 U.S.C. § 3191 (1948) 19, 20, 33, 37
28 U.S.C. § 1254 (1948) 2
28 U.S.C. § 1651 (1948) 7, 14, 18, 19, 24, 25, 29, 37, 38, 39

Treaty:

Extradition Treaty between United States and Venezuela, 43 Stat. 1698 (1922), Generally 2, 3, 7
Article I 13, 18, 19, 26, 37
Article II 4
Article XI 15, 19, 20, 31, 32, 34, 36, 37, 39

Federal Rules of Civil Procedure:

Generally 5, 19, 34, 37
Rule 26 10
Rule 30 5
Rule 45 ..... 10, 20, 37, 38, 39, 40

Federal Rules of Criminal Procedure:

Generally 5, 7, 34
Rule 15 5
Rule 17 ..... 20, 27, 39

Miscellaneous:

Federalist, The, No. 80 (Hamilton) 13
House Report No. 308, 80th Cong., 1st Sess. (1947) 25
Lamburg, *The Bankers' and the Brokers' Privilege*, 25 Colum. L. Rev. 152 (1925) 43
Manual for United States Commissioners (1943, rev. 1948) .. 40
Note, Title 18 U.S.C. § 3181 (1958 ed.) 13
4 Ops. Att'y Gen. 201 (1843) 23, 24
Record, pp. 20-26 (30-41 in original), *Bingham* v. *Bradley*, 241 U.S. 511 ..... 14, 32
Record, pp. 15-28 (31-54 in original), *McNamara* v. *Henkel*, 226 U.S. 520 ..... 14, 32

Treatises:

Cyclopedia of Federal Procedure (3d ed. 1952) 24
Hackworth, *Digest of International Law* (1942) 23, 24
Wigmore, *Evidence* (3d ed. 1940) 41, 42, 43

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THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit entered on January 29, 1960. That judgment reversed an order* of the United States District Court for the Southern District of Florida, Miami Division, denying motions to quash

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* As the statement will show at pp. 7-8, *infra*, two orders of the District Court are involved.

subpoenas duces tecum in an international extradition case. The Court of Appeals remanded the case to the District Court with directions to quash the subpoenas duces tecum. Petitioner further prays this Court to reverse the judgment of the Court of Appeals.

THE JUDGMENT AND OPINION BELOW

The orders of the District Court involved in this proceeding are those of November 25, 1959, December 15, 1959 and January 4, 1960, set out in Appendix 2. These orders are not reported.

The per curiam opinion and judgment of the Court of Appeals are set out in Appendix 3, pp. 3-7. The per curiam opinion of the court is reported under date of February 1, 1960, at 274 F. 2d 206.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 29, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In an extradition proceeding pursuant to the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698, and pursuant to 18 U.S.C. § 3184 has a United States District Judge conducting the proceeding, or the United States District Court in which he sits, the power to issue a subpoena duces tecum in aid of the proceeding?

2. Is the service of a subpoena duces tecum in an extradition proceeding, particularly a subpoena which

does not require the attendance of a witness at court, limited to service only within the district or, if without the district, only within 100 miles of the place of the hearing?

3. Does a bank depositor have any privilege or other legally protected interest in a bank's records of his account which may defeat a subpoena requiring the bank to produce such records in an extradition proceeding to which the depositor is not a party?

STATEMENT

This petition stems from an international extradition proceeding before the Honorable William C. Mathes, United States District Judge, sitting by special assignment in the United States District Court for the Southern District of Florida, Miami Division. That proceeding was initiated by the filing of a complaint on August 24, 1959, by this petitioner pursuant to the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698, and the extradition statute, 18 U.S.C. § 3184, against Marcos Perez Jimenez, a citizen of Venezuela who has been formally charged in the original jurisdiction of the highest court of that country with a variety of financial crimes and with complicity in four specified murders. On the same day as the filing of the complaint in the United States District Court a warrant of arrest was issued by that court, served on the defendant the next day, and the defendant was admitted to bail.

A formal request for extradition, with supporting documents, was lodged with the Department of State by the Ambassador of Venezuela, and subsequently filed in the District Court in Miami. These supporting documents include the charges preferred against the

defendant by the Attorney General of Venezuela in the Federal Court of that country, the finding of that court that the charges and evidence establish cause for prosecution and arrest, the warrant of arrest, and a substantial quantity of the evidence presented to the Federal Court.

The complaint in the extradition proceeding, amended since the original filing on August 24, 1959, charges the defendant with complicity in several murders and with serious and large-scale financial crimes amounting to an ambitious program of wholesale theft of public funds, all in violation of specified provisions of the Penal Code of Venezuela (R. 74-75, 113-92, 222-32, 247-52). These crimes occurred during the period 1948-1958, when the defendant was a member of the Government Junta of Venezuela and, later, President of the Republic, exercising in those capacities the ultimate power over public finances, as over most other matters in which the government of Venezuela was concerned. He was removed from power and fled the country in January, 1958.

Article II of the Extradition Treaty with Venezuela, 43 Stat. 1699, specifies crimes for which extradition shall be made under the Treaty, including the crimes of murder, embezzlement or criminal malversation by public officers, fraud, breach of trust, receipt of money knowing the same to be unlawfully obtained, and participation as an accessory in any of these crimes. The charges against the defendant in Venezuela and in the District Court in Miami fall within these treaty crimes.

Documentary evidence submitted to the Federal Court in Venezuela, presented to the Department of

State and filed as part of the formal extradition papers in the District Court, disclosed that defendant's program of illegal enrichment was carried out with the assistance and connivance of his close associates during his tenure of public office, and through the facilities of banks in the United States, among others (R. 170-252). Accordingly, this petitioner, the plaintiff in the extradition case, served notices for the depositions of officers of two of these banks—The First National City Bank of New York and French American Banking Corporation (R. 65-69). The notices were duly presented to the clerk of the United States District Court for the Southern District of New York, who issued subpoenas to these officials to appear for oral depositions within that district and to bring with them specified records of transactions of their banks with defendant and certain of his associates. (Those subpoenas do not appear in the record before this Court, since they did not appear in the record of proceedings before Judge Mathes.)

On November 12, 1959, defendant moved in the District Court in Miami for a protective order pursuant to Rule 30(b) of the Civil Rules, contending that the deposition notice failed to comply with Rule 15 of the Federal Rules of Criminal Procedure (R. 70). The motion was heard before Judge Choate, in the absence of Judge Mathes. Judge Choate issued an order on November 13 vacating the deposition notice and subpoena and providing that the Civil Rules should not govern the proceeding, but that procedure should be pursuant to the Criminal Rules, "as they may apply" (Appendix 2, p. 1). This order was superseded and vacated by a second order of Judge Choate of November 23, 1959, providing that

"the procedure is to be governed as stated in the Treaty" and that "the court is of the opinion that the right of subpoena exists as relates to witnesses and further that the court may, by order, provide for the securing of testimony where a witness cannot be secured to appear before the court." (Appendix 2, p. 2).

On the same date the extradition proceeding resumed before Judge Mathes and a thorough discussion ensued between counsel and the judge as to the appropriate method of compelling the production of the bank records (R. 83-88). In conformity with the procedure outlined by counsel and approved by Judge Mathes, this petitioner submitted a motion, with supporting affidavit of counsel, for orders in the nature of subpoenas duces tecum (R. 5-8). The proposed orders were signed by Judge Mathes on November 25, 1959, and required the officials of five banks to produce specified bank records (Appendix 2, pp. 3-21).* (The schedules specifying the particular records were substantially the same as those attached to the earlier subpoenas vacated by Judge Choate.) The orders contained carefully drawn protective provisions that had been discussed before Judge Mathes: first, that the witnesses need not actually appear in court, if prior to the return date counsel for the parties were permitted to examine the records and make such copies as they wished; second, that counsel should make no disclosure, without further order of the court, of any of the bank records (relating to persons other than defendant and his family) to anyone other than the plaintiff (meaning the Consul General personally)

* Only those four subpoenas that were involved in proceedings before the Court of Appeals appear in Appendix 2.

and the defendant, except as necessary in preparing or offering the documents as evidence.

These subpoenas were turned over to the U. S. Marshal in Miami for service in the manner provided for subpoenas under the Federal Rules of Criminal Procedure, and service was duly made upon the named officials of The Hibernia National Bank in New Orleans, the Chemical Bank New York Trust Company, The First National City Bank of New York, French American Banking Corporation, and the New York branch of The Royal Bank of Canada. All but the first of these are situated in New York.

The three banks that are respondents here moved jointly to quash the subpoenas directed to them, and their motion (R. 9) was heard before Judge Mathes on the original return date, December 14, 1959. Also heard on that date were motions to quash filed by two depositors: Silvio Gutierrez, a depositor in the Chemical Bank New York Trust Company, and Napoleon Dupouy, a depositor in The First National City Bank of New York and French American Banking Corporation (R. 394, 439). Records of the accounts of these depositors were among the records described in the subpoenas.

In the course of the December 14 hearing the questions of the applicability of the civil or criminal rules in the court's discretion and of the court's subpoena power under the Treaty, the extradition statute, and the all-writs statute (28 U.S.C. § 1651) were explored at length, as well as means of further reducing any burden that might be claimed by the banks. In an order entered the next day, December 15, 1959, Judge Mathes denied the motions to quash, but

modified the subpoenas of November 25 so as to incorporate certain protective considerations that were discussed at the hearing: (a) the return date was extended to January 4, 1960, (b) no records of transactions of less than $1,000 were to be produced, (c) this petitioner was required to reimburse the banks for any unusual expenses incurred in response, (d) the time span of records required by the subpoena was reduced to eliminate records subsequent to June 30, 1958 (Appendix 2, p. 25). Subsequently, the return date was extended to January 27, 1960 (Appendix 2, p. 28).

After December 15 additional depositors moved to quash, namely, Fortunato Herrera and Polinversiones, C.A. (not specifying the banks in which they were depositors) and Pedro A. Gutierrez Alfaro and his wife, Lola T. de Gutierrez Alfaro, depositors in The First National City Bank of New York (R. 363, 471). After hearing on January 4 their motions were denied by order of the same date (Appendix 2, p. 27).

Notices of appeal were filed by all movants, *i.e.*, the three banks and the six depositors. (R. 31, 374, 418, 482).

Meanwhile, The Hibernia National Bank voluntarily sent copies of their records to counsel and that bank was not involved in subsequent proceedings in the Court of Appeals.

The three banks and the six depositors then filed petitions in the Court of Appeals for leave to petition for a writ of prohibition or mandamus (with petitions attached) (R. 297, 357, 385, 427, and 465). On January 20, 1960, the Court of Appeals ordered a stay

of the subpoena proceedings pending the disposition of the appeals and petitions (Appendix 3, p. 2). The banks' joint petition urged that there is no power of subpoena in a District Court or a District Judge on behalf of the demanding country in an extradition proceeding and that, in any case, the District Court has no power to issue a subpoena for service on a witness outside the district and not within 100 miles of the place of hearing (R. 299). These points were also asserted by the depositors.

Oral argument was had before Chief Judge Rives and Judges Hutcheson and Jones on January 27. Owing to the shortness of time, a typed record was transmitted to the Court of Appeals. The United States filed a brief (R. 492) and appeared as amicus curiae, through Assistant Attorney General Malcolm Wilkey, in support of this petitioner's position with respect to the power of subpoena in an extradition case.

The court below decided the appeals in favor of the banks and depositors. Its decision of January 29 reversed the District Court's order denying motions to quash, Chief Judge Rives dissenting (Appendix 3, p. 3). It is that decision which this Court is asked to review and reverse.

The mandate of the Court of Appeals was transmitted to the District Court in Miami on March 3, 1960. Proceedings in the extradition case resumed before Judge Mathes on March 7, and on March 9 he entered an order quashing the subpoenas on the three banks that are respondents here, in accordance with the mandate of the Court of Appeals (Appendix 2, p. 34). On March 25 the Court of Appeals amended its judgment (Appendix 3, pp. 11-12) to make it clear

that it intended also to order the subpoena on the Chemical Bank quashed, and Judge Mathes quashed that subpoena by order of April 7.

Meanwhile, on motion of this petitioner, Judge Mathes entered another order on March 9 permitting petitioner to take the depositions of officials of the three respondent banks, in accordance with the practice outlined in Rules 26 and 45 of the Federal Rules of Civil Procedure, subpoenas to be issued by the United States District Court for the Southern District of New York, where the banks are situated (Appendix 2, p. 31). The banks, regarding that order of March 9 as contrary to the mandate of the Court of Appeals, petitioned that court for leave to file a petition for a writ of prohibition or mandamus to vacate the order. On March 25 the Court of Appeals denied the petition for leave to file, stating that Judge Mathes' order of March 9 was not before it for decision in the earlier case and not contrary to the mandate (Appendix 3, p. 15). This action of the Court of Appeals is explicable on the ground that Judge Mathes' order to proceed with depositions was not itself a subpoena and that the question of the power to issue a subpoena in extradition would only arise when subpoenas were issued by the United States District Court for the Southern District of New York and should be litigated there and in the Second Circuit.

On March 15, 1960, deposition notices were served upon officials of the three respondent banks, with subpoenas issued by the United States District Court for the Southern District of New York. A joint motion to quash was filed by the banks on the same grounds as those urged in the Fifth Circuit and, on application of Napoleon Dupouy, an order was issued to show

cause why the subpoenas should not be quashed, both assigned for hearing before Chief Judge Ryan on April 14. After partial argument the hearing was adjourned, the depositions were continued until May 10, and Chief Judge Ryan ordered the matter submitted on briefs by April 29. In addition, a deposition notice has been served on the Chemical Bank, with a subpoena issued by the District Court in New York. The defendant in the extradition case and respondent Gutierrez Alfaro sought protective orders from Judge Mathes to prevent the taking of the depositions. Their motions have been denied, and defendant has filed his notice of appeal to the United States Court of Appeals for the Fifth Circuit. Thus, it may be expected that further litigation over the subpoena power in extradition will come to this Court through the Fifth and Second Circuits in the near future.

The original record in the proceedings below has been transmitted to this Court.*

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* The clerk of the Court of Appeals, in preparing the original record for certification, consecutively paginated the first two volumes by a numbering machine and transmitted them to this Court. Subsequently he prepared a Supplemental Record and a Second Supplemental Record, each of which he paginated separately, beginning with page 1. With the permission of the office of the clerk of this Court, petitioner's counsel has paginated the Supplemental Record and Second Supplemental Record by machine so as to continue the consecutive pagination of the first two volumes. All record references contained in this petition are to the consecutive machine pagination.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important and novel federal question which will have a far-reaching effect on the conduct of extradition cases in the federal courts. The court below has placed a serious restriction on the administration of 18 U.S.C. § 3184, which in this case will, and in future extradition cases may, confine the efficacy of the extradition treaty obligation.

Below we state five reasons, falling within the criteria of importance which this Court has laid down, warranting the issuance of its writ to review the judgment of the lower court. But there is one other reason so unusual, yet so obvious, that unless mentioned it could be overlooked in the details of the problems involved here.

In this proceeding a sovereign republic of this hemisphere has asked the assistance of the United States government in effecting the extradition of a former president of that republic charged with the most serious crimes. The Venezuelan government has proceeded in court through its Consul General under its treaty with the United States, and has also asked the United States for the aid of its legal officers. The Government of the United States, loyal to a treaty obligation, has responded appropriately by supporting the position of the Venezuelan government in the Court of Appeals through an Assistant Attorney General of the United States, and thereby supporting the judicial power necessary to the performance of the nation's treaty obligation. The Court of Appeals refused to sustain the exercise of judicial power below, and decided against the position of the two governments, without any statement of its reasons. Surely

an issue of this importance, concurred in by both governments, parties to a treaty, decided in a case of the highest moment, and decided adversely to both governments, warrants the attention and review of our highest court. Indeed, similar considerations of the gravity of the interests of a sovereign government led to the framing of the original jurisdiction of this Court as provided in Article III, Section 2, of the Constitution of the United States (*The Federalist*, No. 80 (Hamilton)), and should provide in this case a weighty reason for review.

There are five additional reasons why it is important that this Court grant its writ and clarify the power of the District Court or District Judge in extradition to compel evidence.

First, the United States is a party to sixty-five bilateral treaties of extradition and a multilateral convention on extradition (to which ten other nations are parties), in virtually all of which treaties appear provisions more or less similar to the provision of Article I of the Venezuelan Treaty which, together with 18 U.S.C. § 3184, requires a hearing of evidence of guilt before a judicial officer. See Note to Title 18 U.S.C. § 3181 (1958 ed.). The question of judicial power to compel the production of evidence that is found in the United States may arise under any of these treaties. Whether such judicial power exists may determine whether the demanding nation's treaty right shall be effectively enforced. If the Court of Appeals' decision stands, the United States, far from closing its doors to fugitive criminals from abroad as these treaties contemplate, may well become a haven for such criminals and a notorious place of concealment of evidence of their crimes.

Second, to deny power to the extradition judge or the District Court to issue subpoenas or to serve them wherever in the United States may be necessary places a significant limitation upon the scope of the all-writs statute, 28 U.S.C. § 1651, and upon this Court's decision in *American Lithographic Company* v. *Werckmeister,* 221 U.S. 603, which held that a subpoena is broadly authorized by that statute. The applicability of 28 U.S.C. § 1651 and the *Werckmeister* decision to the subpoena power in extradition proceedings should be definitively settled by this Court.

Third, the decision below appears to conflict with accepted practice in extradition proceedings by which the demanding country may and does offer evidence in addition to that on which the original warrant of arrest was based. Respondents urged below that such evidence is not available to the demanding country, but that the evidence is confined to that "upon which the accusation [presumably in the demanding country] is based" (R. 530). While one cannot tell from the per curiam statement of the Court of Appeals how completely this argument was accepted, the point clearly was a possible basis of decision. On the contrary, accepted practice has permitted evidence obtained in this country after arrest to be offered at the hearing, and examples of such evidence appear in the records of extradition cases that have come to this Court. See, *e.g.,* Record, pp. 20-26 (30-41 in original) in *Bingham* v. *Bradley,* 241 U.S. 511; Record, pp. 15-28 (31-54 in original) in *McNamara* v. *Henkel,* 226 U.S. 520.

Fourth, the decision below is inconsistent also with that liberal construction of treaty provisions which this Court has enjoined upon the judiciary in *Factor* v. *Laubenheimer,* 290 U.S. 276. In that thoroughly

considered decision the Court emphasized that the extradition treaty provisions there involved should be construed to give liberal effect to the purpose of the treaty, to wit, the surrender of fugitives duly charged with crime:

> "The obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships . . . should be construed more liberally than a criminal statute or the technical requirements of criminal procedure." 290 U.S. 276, 298.

Article XI of the Venezuelan Extradition Treaty provides that: "The judicial functionaries . . . shall prescribe the method of complying with the legal formalities of the country from which the extradition is requested." 43 Stat. 1704. We believe that, liberally interpreted, this provision of the Treaty authorizes the extradition judge to select a reasonable form and method of subpoena, free of the restrictions of the rules governing other types of cases. This Court should require the Court of Appeals to adhere to the principle of liberal construction of treaties.

Fifth, if the Court of Appeals decided that the depositors have a valid ground to quash the subpoenas because of a property interest in the bank records, its decision would conflict with prior decisions of other courts of appeals holding that depositors have no property interest in a bank's records of their accounts. *Foster* v. *United States*, 265 F.2d 183 (2d Cir. 1959), *certiorari denied*, 360 U.S. 912; *Zimmermann* v. *Wilson*, 105 F.2d 583 (3d Cir. 1939); *United States* v. *Peoples Deposit Bank & Trust Co.*, 112 F. Supp. 720 (E.D. Ky. 1953), *affirmed*, 212 F.2d 86 (6th Cir. 1954) (adopting opinion of District Court),

certiorari denied, 348 U.S. 838; *McMann* v. *Securities and Exchange Commission*, 87 F.2d 377 (2d Cir. 1937), *certiorari denied*, 301 U.S. 684. If, as is the other possibility, a supposed depositor's privilege were the basis of decision, that would equally conflict with the decisions of the Fifth Circuit itself and decisions of other courts of appeals. *Bowles* v. *Shawano Nat. Bank*, 151 F.2d 749 (7th Cir. 1945), *certiorari denied*, 327 U.S. 781; *Societe Internationale* v. *McGranery*, 111 F. Supp. 435 (D.D.C. 1953), *affirmed with modification sub nom. Societe Internationale* v. *Brownell*, 225 F.2d 532 (D.C. Cir. 1954), *certiorari denied*, 350 U.S. 937; *McMann* v. *SEC*, *supra*; *Falsone* v. *United States*, 205 F.2d 734 (5th Cir. 1953), *certiorari denied*, 346 U.S. 864. This Court should resolve the conflict.

REASONS FOR SUMMARY REVERSAL

In urging this Court to grant the writ and reverse the judgment of the Court of Appeals on the papers now before it, we do not suggest that the need for an expeditious decision from this Court warrants skimping the time for full and careful consideration. But we do urge that neither the existence of power to compel evidence in this extradition proceeding nor the propriety of its exercise by the judge here presiding is a question tnat calls for extended argument or study, while a matter of great public importance does call for "all deliberate speed" by this Court in making its decision.

Regardless of the importance of the evidence sought by the subpoenas here at issue and those involved in the deposition proceedings now pending, doubt about the power to issue a subpoena will continue to haunt the proceedings, including the defense, until the

question is settled. And this will occur in an extradition proceeding commonly regarded throughout Latin America as a test of the good faith of the United States.

For some years the relations of this country with the Latin American countries have been the cause of increasing concern. Most observers have concluded that the presence here of the deposed dictator of Venezuela, Perez Jimenez, was an important cause of the popular resentment in Venezuela and elsewhere in the hemisphere, where it was widely interpreted as American support of dictatorial governments, of which there had been complaints over many years.

The commencement of the extradition case by this petitioner against Perez Jimenez has been carefully and hopefully watched as a possible turning point in the recognition here of the democratic aspirations of the American republics. These developments are briefly traced in Appendix 4 hereto, consisting of reports and public statements of qualified observers and officials.

For this reason it is important that issues arising from the extradition case be decided as promptly as the requirements of justice permit.

The reasons for reversal are developed in the argument that follows.

SUMMARY OF ARGUMENT

A district judge conducting an extradition proceeding pursuant to the Extradition Treaty with Venezuela and the extradition statute is charged with a responsibility and a function that are judicial in nature. The case requires the type of determination

that is characteristic of judicial responsibility and of the exercise of judicial powers. The proceeding has adverse litigants and genuine adverse interests between the parties. It involves legal and factual issues peculiarly suited to judicial determination and susceptible of finality of judgment. Whether the extradition case involves judicial power in the strict sense of Article III of the Constitution is unimportant. Article I of the Treaty and 18 U.S.C. § 3184 create a function, judicial in nature, to be performed, as it properly may be, by a statutory tribunal consisting (in this case) of a federal judge. See *Williams* v. *United States*, 289 U.S. 553.

Since the judge hearing the extradition proceeding acts, in substance, as a statutory court, he is within the purview of the all-writs act, 28 U.S.C. § 1651, amended in 1948 to confer its authority upon statutory, as well as constitutional, tribunals. This statute, providing that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," includes the authority to issue a subpoena duces tecum. *American Lithographic Co.* v. *Werckmeister, supra; Kamen Soap Products Co.* v. *United States*, 110 F. Supp. 430 (Ct. Cl. 1953); *Bethlehem Shipbuilding Corporation* v. *National Labor Relations Board*, 120 F.2d 126 (1st Cir. 1941). And if the powers of the judge should not include the power to issue compulsory process, the power of the District Court in which he sits would extend to the proceedings for, at least, ancillary purposes, enabling the court to act in aid of the proceeding. *The United States, Petitioner*, 194 U.S. 194; *United States* v. *Tom Wah*, 160 Fed. 207

(N.D.N.Y. 1908), *affirmed*, 163 Fed. 1008 (2d Cir. 1908). This power of the court may be invoked to issue a subpoena, and, indeed, the subpoenas involved here could have been, and possibly were, issued by the court itself.

Article I of the Extradition Treaty with Venezuela, which defines the governing standard of sufficiency of evidence, emphasizes the practical necessity for the subpoena power. And Article XI of the Treaty, which provides that "the judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested," merits a liberal interpretation to carry out the purpose of the Treaty and to give effect to Article I. *Factor* v. *Laubenheimer, supra.* So construed, Article XI provides the extradition judge with sufficient latitude to fashion the method and form of a subpoena to suit the needs of the individual case.

The extradition statute, 18 U.S.C. § 3191, presupposes that the subpoena power is available to both parties.

The exercise of subpoena power by the extradition judge is not limited to service within 100 miles, since the judge is not confined to the particular provisions of the Federal Rules of Civil Procedure containing the 100-mile limitation. A subpoena issued pursuant to the independent authority of 28 U.S.C. § 1651 is not subject to the conditions fixed by another statute or set of rules, *American Lithographic Co.* v. *Werckmeister, supra; Kamen Soap Products Co.* v. *United States, supra,* just as a subpoena may be issued under Section 1651 in the absence of *any* rule or statute pro-

viding for subpoenas. *Bethlehem Shipbuilding Corp.* v. *NLRB, supra.* Outside of the Civil Rules no general policy of judicial administration is apparent which should limit a subpoena to service within 100 miles of the place of hearing. On the contrary, a policy permitting service at any place within the United States may be inferred from the provisions of Rule 17, Federal Rules of Criminal Procedure. In any case, the subpoenas involved here do not require the attendance of witnesses at the hearing, within the terms of Civil Rule 45(e)(1). Moreover, neither the discretion given to the extradition judge under Article XI of the Treaty with Venezuela, nor the subpoena power contemplated by the extradition statute, 18 U.S.C. § 3191, provides or implies a geographical limitation upon service.

The orders of the District Court as to the depositors should be affirmed in any case, since a bank depositor does not have any property interest or any privilege with respect to a bank's records of his accounts, and consequently no interest or standing to assert as basis of a motion to quash a subpoena directed to the bank.

ARGUMENT

I

THE EXTRADITION JUDGE, OR THE COURT IN WHICH HE SITS, HAS THE POWER TO ISSUE A SUBPOENA

A. THE FUNCTION OF THE EXTRADITION JUDGE IS JUDICIAL IN NATURE.

It is important to analyze, at the outset, the judicial nature of the responsibility of the extradition judge and of the determination he must make under 18 U.S.C. § 3184. The purpose of such an analysis is not to demonstrate that the proceeding is one within the strict scope of Article III of the Constitution—it is

not necessary that it be. Rather, our purpose is to show that the extradition judge has a special judicial responsibility by statute, and hence must be accorded the powers of a statutory tribunal, including the subpoena power. It is settled that Congress, in the exercise of its legislative power, may create special statutory tribunals to make determinations of a judicial character and that these powers are not derived from or confined to the specifications of Article III. *Williams* v. *United States, supra;* see *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582. Therefore we need not be concerned with the constitutional status of the proceedings that Congress has authorized for extradition. It is enough that they are judicial in character, for reasons that we now discuss.

The extradition judge's duty is defined by 18 U.S.C. § 3184. That section, the full text of which appears in Appendix 1, provides that the accused

> ". . . may be brought before such . . . judge . . . to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

That these provisions require a proceeding of a judicial nature is apparent from the presence in

extradition of the familiar criteria of a case or controversy. First, the proceeding is between adverse litigants. The proceeding is initiated by the filing of a complaint, by which the plaintiff charges the defendant with specified crimes. Both parties are represented by counsel. The hearings take place in open court, with a transcript of proceedings. All papers are filed with the clerk.

Second, there can be no doubt that between these adverse litigants there are real and substantial adverse interests. The interest of the plaintiff is in securing the judge's warrant committing the defendant to jail to await surrender. The interest of the defendant is in securing his liberty by defeating the charges advanced in the complaint, and this involves either disputing plaintiff's evidence or raising legal objections based upon the treaty or statute.

Third, the questions involved in the litigation of these adverse interests are questions of fact and law, types of questions that courts determine and that lend themselves to determination by courts. The issue before the judge is whether the defendant is extraditable. The resolution of this issue requires an examination and evaluation of evidence, and a determination whether probable cause is made out. See *Charlton* v. *Kelly*, 229 U.S. 447; *Benson* v. *McMahon*, 127 U.S. 457. In addition to a factual determination, legal issues must be disposed of—whether a given treaty or convention applies, whether the charges are within the crimes specified in the treaty, whether a statute of limitations applies and has run or has been tolled, and whether the numerous procedural requirements of extradition have been satisfied. These

questions are characteristically the material of judicial determination.

Fourth, the judge's determination of the issues submitted to him is as final as the resolution of many litigations that are unquestionably judicial in nature. The question submitted to the judge under 18 U.S.C. § 3184 is *not* whether the defendant shall be surrendered to the demanding government. The question that the judge decides is whether the defendant shall be committed to await the action of the Secretary of State, or to put it another way, whether the Secretary *may* surrender the defendant. If "the evidence [is] sufficient to sustain the charge under the provisions of the proper treaty or convention . . ." the judge "shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender [to the demanding government] is made." 18 U.S.C. § 3184. On the question of commitment the judge's determination is conclusive upon the Secretary of State. As Secretary Root stated in a letter to Governor Campbell in 1908,

> "As you are aware, it is necessary in extradition cases that a judicial hearing should be held before a competent extradition magistrate, and that the latter should issue his commitment for the surrender of the fugitive, before final action can properly be taken by this Department." IV Hackworth, *Digest of International Law*, p. 116.

Attorney General Nelson advised Secretary of State Upshur to the same effect even prior to the enactment of the 1848 extradition statute, when extradition was governed by treaty provisions alone: "Beyond this judgment I do not think it is the duty or province of the President to look. It is conclusive." 4 Ops.

Att'y Gen. 201, 205 (1843). Thus, the judge's ruling in favor of the defendant is final, at least for the particular case, for it bars his surrender by the Secretary of State.

The judge's decision is no less final when it is against the defendant. This determination is final, for it is executed by the judge's warrant committing the accused to jail. See *Collins* v. *Loisel*, 262 U.S. 426; *In re Kaine*, 14 How. 103; Cyclopedia of Federal Procedure, § 40.201. Of course, the Secretary of State may, for political, diplomatic or other reasons, decline to surrender the defendant to the demanding government. Hackworth, *supra*, § 338. But in making his decision he is not reviewing or revising the judge's determination, for the judge's warrant has been executed before the Secretary of State acts.*

B. THE EXTRADITION JUDGE HAS A POWER OF SUBPOENA UNDER 28 U.S.C. § 1651.

For the reasons stated in the foregoing subsection we believe that 18 U.S.C. § 3184 constitutes the extradition judge a special legislative tribunal charged with a judicial responsibility and possessing judicial powers in the proceeding entrusted to it. Some of these powers are provided by 28 U.S.C. § 1651, the all-writs statute, and include the power to subpoena evidence.

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* We are aware of certain language in Attorney General Nelson's opinion to Secretary Upshur, 4 Ops. Att'y Gen. 201 (1843), to the effect that extradition does not involve the exercise of judicial power under Article III of the Constitution, and hence unconstitutional action could not be charged against the commissioner who heard the case. We do not rely on Article III as the basis of the judicial powers that a judge may exercise in an extradition case, but rather upon statutory responsibility and powers of a judicial nature. Attorney General Nelson's opinion is, therefore, not directed to the question that we ask this Court to decide.

The pertinent portion of the all-writs act provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions. . . ." This text was adopted in the 1948 codification. Prior to that time the section limited the all-writs power to the "constitutional" courts. See, for example, 1 Stat. 81 (1789); Rev. Stat. § 716 (1875); 36 Stat. 1162 (1911). When the Judicial Code was revised in 1948 the House Judiciary Committee Report stated:

> "The revised section extends the power to issue writs in aid of jurisdiction to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts." H.R. Rep. No. 308, 80th Cong., 1st Sess. A145 (1947).

It is settled that a subpoena duces tecum is one of the writs that may be issued under the all-writs act. *American Lithographic Co.* v. *Werckmeister, supra.* And since the amendment of 1948, to include legislative tribunals, the Court of Claims has held that it derives a subpoena power from that statute. *Kamen Soap Products Co.* v. *United States, supra.* If the intention of Congress was, as the House report states, to make explicit the powers that were formerly implied from the creation of the courts, the writ powers must have been provided for all legislative tribunals that are charged with judicial responsibilities. This would surely include the extradition tribunal created by the extradition statute, since judicial powers under Section 1651 are not limited to any particular type of proceeding or to any particular type of court. Thus, where the effective exercise of jurisdiction requires the issuance of a subpoena, Section 1651 may be

invoked by the extradition judge, and the Court of Appeals' decision to the contrary introduces a new and unwarranted restriction upon that section and upon the effect of this Court's decision in the *Werckmeister* case.

In an extradition case there are strong reasons why the subpoena power is "necessary or appropriate" to the effective exercise of the jurisdiction of the extradition judge. There is a treaty obligation to the demanding country, in this case Venezuela, to surrender a person charged with or convicted of treaty crimes. This obligation is subject to the condition that surrender shall take place only

> "upon such evidence of guilt as, according to the laws of the country in which the fugitive or accused shall be found, would justify his detention and commitment for trial if the crime or offense had been committed there." Article I, 43 Stat. 1699.

Similar treaty provisions have been held to establish a standard of sufficiency of evidence that is similar to that governing in preliminary proceedings in our domestic criminal courts, *i.e.*, a probable cause standard. *Charlton* v. *Kelly, supra; Grin* v. *Shine*, 187 U. S. 181; *Benson* v. *McMahon, supra.* As this Court has described the standard:

> ". . . we are of opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining

> whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him." *Benson* v. *McMahon*, 127 U.S. 457, 463.

Since probable cause must be satisfied in extradition, it follows in common sense that a subpoena power should be available, similar to that which is available in preliminary examination under Rule 17(a), F.R. Crim. P., particularly in the light of the duty of the courts to construe liberally the powers exercised pursuant to a treaty, so as to encourage the objects of the treaty. See *Factor* v. *Laubenheimer, supra.*

The subpoena power is a "necessary or appropriate" writ for another reason. To deny to an extradition judge the power of subpoena would encourage the most flagrant abuse of the hospitality of this country by fugitive criminals seeking easy concealment of evidence of their guilt and of the fruits of their crimes. The position taken by the respondent banks obviously attracts deposits of fugitives who wish to conceal illegally gained riches, and, of course, it is likely that, if the subpoenas on the banks must be obeyed, depositors of this stripe will transfer their funds to a country the laws of which enforce secrecy in financial transactions. But in the United States a bank's interest in serving as a haven for the fruits of foreign crimes is not enough to put evidence beyond the reach of our courts. Surely an extradition treaty cannot be so easily frustrated as by the fugitive placing the evidence of crime in American hands.

Indeed, there are healthy signs that civilized opinion disapproves national policies that offer depositors virtual immunity from criminal investigation. The Juridical Committee of the 48th Conference of the Interparliamentary Union, at its meeting in Warsaw in September of 1959, adopted a resolution proposed by the Venezuelan delegation, reading in part as follows:

> "That the Conference of the Interparliamentary Union make an appeal to all the national groups for the purpose of encouraging in the legislative field, in international negotiations, and in the conscience of their respective peoples and governments, a common attitude based on principles of Justice and Law, in order to prevent public funds, misappropriated in any State by those in power through the abuse of said power, from being enjoyed with impunity and under guarantees in the territory of another State."

The full text of the resolution appears in Appendix 5.

The resolution was accepted by a 10-0 vote of the Juridical Committee, and has been set down for discussion at the next regional conference in Santiago, by action of the Executive Committee of the IPU. (See Appendix 5).

One's sense of the practical rebels at the futility of an extradition proceeding in which the judge can receive evidence only if it is volunteered. Judge Mathes, in proceedings before him on March 7, 1960, well expressed the disbelief that is prompted by the respondent banks' contention:

> "And if there are any unfriendly people whom he wishes to come into court and tell the truth

before the magistrate, there is no way he can compel them to come in? They may be standing out in the hallway and he can't get them? (Tr. 296.)

* * * * *

"I am forced to believe or take the view, as I see it, that this court either has it [power of compulsory process] or that it conducts a sterile hearing, hearing only people who want to come here . . ." (Tr. 328.)

The subpoena power has further point in extradition, when one considers that the defendant must be identified by proof. Identity is not established by the record of the foreign warrant of arrest, for it is the defendant before the American extradition judge who must be identified. If, as in this extradition case, the front bench of seats in the courtroom is filled with individuals who personally know the defendant and can identify him as the former dictator of Venezuela, is the judge unable to compel them to come forward and testify? Must the judge rely upon a witness to come forward and testify voluntarily? Neither Congress nor the framers of the Extradition Treaty intended the proceedings to be so easily frustrated.

C. IN ANY CASE THE UNITED STATES DISTRICT COURT HAS THE POWER TO ISSUE A SUBPOENA IN AID OF THE JURISDICTION OF THE JUDGE.

Even under different legislation which gave the extradition judge none of the characteristics of a legislative court for the purposes of 28 U.S.C. § 1651, the jurisdiction of the District Court itself would extend to action in aid of the proceeding before such a judge. Certainly the statutory assignment of extradition cases to a "judge", rather than to a "court",

does not deprive the judge of the support of the ancillary jurisdiction of his court. As this Court has said, "Many cases may be found in which the words 'court' and 'judge' were held to have been used interchangeably . . ." *The United States, Petitioner, supra* (unanimous opinion by Fuller, C.J.). In that case the Court had before it Section 13 of the Chinese Exclusion Act, 25 Stat. 479 (1888), which provided for hearing before a commissioner and an "appeal to the judge of the district court for the district . . .". The Court held that the effect of the statute was to place the appeal within the jurisdiction of the *district court itself* so as to require the clerk of the district court to enter judgment on the record and prepare a certified transcript for a further appeal. The clerk had refused to do so on the ground that the proceedings on appeal from the commissioner were before the judge as judge, rather than within the jurisdiction of the district court proper. In granting a writ of mandamus to compel the clerk to act, this Court cited and discussed a number of lower court precedents holding that statutory proceedings before a judicial officer lay also within the jurisdiction of the court itself for certain purposes.

A district court must retain some supervisory jurisdiction of an extradition case that is before a district judge, so as to insure the conduct of an orderly and effective proceeding. In proceedings before Judge Mathes, for example, the clerk of the District Court has filed in the court record the complaint, motions, rulings, transcript and evidence in the case. It would appear from this Court's decision in *The United States, Petitioner, supra,* that the clerk could be required to do so, had he refused. It is hardly

an extension of reasoning to say that the District Court must have available, if the judge does not, certain fundamental powers and process, such as subpoena and contempt powers, to insure that the proceeding before the judge is not an idle one. So it has been held in a statutory proceeding before a commissioner under the Chinese Exclusion Act:

> "I am not willing to concede, and protest against the doctrine advanced, that Congress has made a law authorizing the District Court to appoint commissioners, has prescribed the duties of such commissioners, including the power to try and determine certain questions in certain cases . . . but has left them powerless and the court without power to aid them, in an appropriate way, in the performance of such duties." *United States* v. *Tom Wah*, 160 Fed. 207, 210 (N.D.N.Y. 1908), *affirmed* 163 Fed. 1008 (2nd Cir. 1908), holding that a district court may compel a witness to testify in proceedings before a commissioner.

We submit that, in his capacity as a judge of the District Court, if not in his capacity as extradition judge, Judge Mathes had the power to issue and modify the subpoenas of November 25, and to hear and rule on motions directed to them. The decision of the court below, denying this power, is inconsistent with this Court's decision in *The United States, Petitioner, supra.*

D. THE EXTRADITION STATUTE AND TREATY PRESUPPOSE A SUBPOENA POWER IN AN EXTRADITION CASE.

One of the provisions of Article XI of the Treaty offers a strong suggestion that the executive and legislative authorities who framed and ratified the Treaty with Venezuela presupposed that a judicial

subpoena power would be available on behalf of the demanding country in extradition. That article, providing for the materials to be furnished to the government of which extradition is requested, reads in part as follows:

> "If, however, the fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced, *with such other evidence or proof as may be deemed competent in the case.*" 43 Stat. 1705. (Emphasis supplied.)

It is clear from this provision that the demanding country may offer evidence beyond that on which the original warrant there was based. No limitation is placed upon this evidence, except that it shall be "competent". So far as Article XI is concerned, this competent evidence may be procured prior to or after the arrest, in the demanding country or in the country where the fugitive is found, or anywhere else. The broad scope of Article XI clearly includes the use of evidence obtained in the United States after arrest. Extradition practice has permitted such evidence to be offered at the hearing, and examples may be found in the records of cases that have come to this Court. See Record, pp. 20-26 (30-41 in original) in *Bingham* v. *Bradley, supra;* Record, pp. 15-28 (31-54 in original) in *McNamara* v. *Henkel, supra.* Article XI obviously presupposes that the demanding government has some way to produce this evidence. And since the commands of the demanding government's courts do not extend to the United States, the only available means of producing the evidence in the

extradition case is by a subpoena of the American court.

A provision of the extradition statute, 18 U.S.C. § 3191, also furnishes a strong indication that Congress presupposed a subpoena power to be available to either party in extradition. That section provides for payment by the United States of the costs of witnesses subpoenaed on the motion of an indigent defendant:

> "§ 3191. *Witnesses for indigent fugitives*
>
> "On the hearing of any case under a claim of extradition by a foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner hearing the matter may order that such witnesses be subpenaed; and the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner as in the case of witnesses subpenaed in behalf of the United States."

Section 3191 makes sense only if it is read to authorize the government to pay for a subpoena that derives its basic authority from other sources. It makes no sense if it is read to create a wholly new and restricted subpoena power. If there had been no subpoena power in extradition prior to the enactment of Section 3191, it is incredible that Congress would have created that power to be used solely on behalf of indigents, while withholding it from defendants who had a few hundred dollars. The purpose of Section 3191 must have been simply to place the expense of an existing remedy on the government, to remove the

practical bar of poverty. But the basic subpoena power was there all along.

The two provisions that we have discussed—that of the Treaty and that of the extradition statute—strongly suggest that a subpoena was assumed, by Congress and the executive, to be a proper adjunct to the duties and powers of the extradition judge. Another provision of Article XI of the Treaty confers wide latitude upon the extradition judge as to the method he may employ in exercising that power. That provision states:

> "It shall be competent for such diplomatic or superior Consular officers to ask and obtain the preliminary arrest of the person whose surrender is requested, before the Government of whom such request is made. *The judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested.*" 43 Stat. 1704. (Emphasis supplied.)

This language leaves to the judiciary wide discretion to lay down reasonable rules for an extradition proceeding, from the earliest stage—the arrest. The broad scope of the grant of discretion makes it plain that, in exercising substantive powers elsewhere conferred, including the subpoena power, the judge hearing the case is not to be imprisoned in the forms and procedures for other types of cases, in the absence of any uniform rules for extradition. Thus, the fact that Judge Mathes borrowed useful techniques from the Criminal and Civil Rules in framing his subpoenas, improvising a form of order to suit the occasion, is far from shocking—it would appear to be exactly the sort of exercise of discretion that Article XI contemplated.

Judge Mathes went no further than he had to go in order to bring material evidence before the court. He did not purport to lay down a comprehensive blueprint of procedure governing all aspects of the case, nor was he asked to do so. The particular need was an order responsive to this petitioner's motion and affidavit for production of evidence disclosed by the original extradition documents. A complication was the fact that no ready-made rules were at hand to govern the form of order. An extradition case is a unique proceeding, not readily compressed into established procedural molds, having some features in common with criminal proceedings and some features in common with civil actions. It is not a criminal case, since it is not a definitive trial of guilt. *Charlton* v. *Kelly, supra; United States ex rel. Oppenheim* v. *Hecht,* 16 F.2d 955, 956 (2d Cir. 1927), *certiorari denied,* 273 U.S. 769; *In re Lo Dolce,* 106 F. Supp. 455, 458 (W.D.N.Y. 1952); *United States ex rel. Klein* v. *Mulligan,* 1 F. Supp. 635, 636 (S.D.N.Y. 1931), *affirmed,* 50 F.2d 687 (2d Cir. 1931), *certiorari denied,* 284 U.S. 665. See also *United States ex rel. Austin* v. *Williams,* 6 F.2d 13 (E.D. La. 1925), *affirmed,* 12 F.2d 66 (5th Cir. 1926). Nonetheless, the defendant's liberty is at stake, and there are obvious similarities between extradition and preliminary examination in a criminal proceeding. *Charlton* v. *Kelly, supra; Benson* v. *McMahon, supra.* See *Collins* v. *Loisel,* 259 U.S. 309. In these circumstances the framing of an order that would effectively bring the evidence before the court, yet not do violence to the defendant's rights, required delicate judgment and thoughtful consideration by Judge Mathes. He examined carefully the plaintiff's need for the evidence, the legitimate interests of the defendant,

the banks and the depositors, and his own powers in the course of oral argument held before him on November 23, 1959, a portion of which is set out in the record (R. 82-88). He then designed an order to deal with his evaluation of all the conflicting interests before him. His orders of November 25 were designed to minimize the burden on the banks by giving them the option of furnishing the documents to counsel at a time and place of convenience, rather than appearing in court (Appendix 2, pp. 3, 8, 13). The interests of depositors were protected by severe restrictions on the disclosure and use that plaintiff's counsel might make of the bank records. Even after this painstaking effort the judge reconsidered the matter on December 14, 1959, in an extremely thorough hearing on motions to quash (R. 89-117), and modified his order to protect further the interests of the banks and ease any possible burden on them. His modifying order of December 15 (Appendix 2, p. 22) provided that records of transactions of less than $1,000 need not be produced; that records subsequent to June 30, 1958, need not be produced, and that plaintiff should reimburse the banks for any unusual expenses incurred in making response to the subpoenas. It is difficult to imagine a court going further than Judge Mathes went to give exhaustive consideration to the consequences of his orders. The dependence of Article XI of the Treaty upon such high and responsible standards of judicial discretion was not misplaced, and, in the absence of rules for extradition proceedings, the action of Judge Mathes was entirely reasonable.

II

SERVICE OF A SUBPOENA IN AN EXTRADITION CASE IS NOT LIMITED TO 100 MILES FROM THE PLACE OF HEARING

Respondents contended below that, even if a subpoena power exists in extradition, the subpoena cannot be served out of the district more than 100 miles from the place of hearing. We believe that the subpoena power is derived from authority that is not subject to the 100-mile limitation.

Plainly, any assertion of a 100-mile limitation on the service of subpoenas must be based upon Rule 45(e)(1), F.R. Civ. P. That is the only source of any such limitation. We believe that the Civil Rules *may* be invoked as an available source of authority, in the exercise of the discretion entrusted to the extradition tribunal. But the judge is not *confined* to the Civil Rules, many provisions of which are wholly inapposite to extradition. Our discussion in the earlier part of this petition has indicated bases of a subpoena power that are quite independent of Rule 45, *i.e.*, the practical need for a subpoena to satisfy the evidence requirements of Article I of the Treaty; the assumption, implicit in Article XI, that evidence in this country may be obtained after arrest; the strong indication in 18 U.S.C. § 3191 that a subpoena power is available to either party; the broad authority of the all-writs statute, 28 U.S.C. § 1651, to issue necessary writs.

The all-writs statute authorizes "all writs necessary or appropriate" in aid of the jurisdiction. The writ that was "necessary or appropriate" to satisfy the evidence requirements of the extradition case before Judge Mathes was a subpoena running to the banks

in New York and New Orleans, not merely a subpoena running 100 miles from court. The necessary writ was issued, though scrupulously limited. The quantity of records to be produced was confined. Disclosure of these records by the plaintiff was restricted. The financial burden on the banks was largely removed. But clearly no geographical limitation on service, short of the place where the records were, would have been "necessary or appropriate" to the occasion. On the contrary, such a limitation would have rendered the writ useless. In short, the necessary writs were issued and served, and are represented by the orders of November 25, and order of December 15, 1959 (Appendix 2, pp. 3, 7, 12, 17, and 22).

A subpoena under Section 1651, moreover, is not bound to the particular conditions specified by another statute or rule. In *American Lithographic Co.* v. *Werckmeister, supra,* it was urged that a subpoena duces tecum issued by the district court did not comply with the notice and hearing procedure required by Rev. Stat. § 724 for compulsory production by a party. This Court, in a unanimous decision by (then) Justice Hughes held that the subpoena power under Section 1651 was quite independent of the requirements and conditions of Rev. Stat. § 724. In *Kamen Soap Products Co.* v. *United States, supra,* the Court of Claims, following the *Werckmeister* decision, held that its power to issue a subpoena duces tecum for government documents under Section 1651 was not curtailed by other, and more specific, statutory provisions and rules for subpoena and production of documents. The subpoena power provided by Civil Rule 45 is limited by the conditions therein specified.

but the independent subpoena power of Section 1651 may be employed with greater flexibility.

Similarly, the grant of judicial discretion by Article XI of the Treaty with Venezuela does not contain any geographical limitation on the reach of our courts, and, on the contrary, opens wide latitude to the courts in devising methods for the exercise of their powers. The means and place of service of a subpoena is a matter of method within Article XI. If Article XI is to be accorded its purpose — and this Court has required treaty provisions to be interpreted generously to give full effect to their purposes, *Factor* v. *Laubenheimer, supra* — it should be read to provide the extradition judge with sufficient latitude to authorize service where service is necessary, particularly when the judge acts with that scrupulous care that characterized the orders of Judge Mathes.

No policy of judicial administration would require implying a 100-mile limitation on a subpoena issued under authority that is independent of Civil Rule 45. The 100-mile provision of Civil Rule 45 is not evidence of a general policy of restriction; a contrary policy is expressed by Criminal Rule 17(e), which authorizes service of a subpoena at any place within the United States, even when issued by a commissioner. The important similarities between extradition and preliminary examination in criminal proceedings — the fact that an individual's liberty is at stake and the probable cause standard of sufficiency of evidence — would justify a careful, selective borrowing from the rules applicable to preliminary examination, and these rules permit a subpoena without a 100-mile limitation. See Rule 17(a), (e), F.R. Crim. P.;

Manual for United States Commissioners (1943, rev. 1948), p. 9.

There are other important reasons that militate against implying a geographical restriction on the power of the extradition court or judge to compel evidence. The treaty obligation to surrender the fugitive, subject to a hearing of evidence, is an obligation of our national government, and it hampers the discharge of this obligation to subject it, without a clear command of Congress or the Treaty, to the technicalities of our domestic civil practice and the compartmentalized civil jurisdiction of our courts. It should be recalled that 18 U.S.C. § 3184 requires that the hearing take place where the fugitive is found. If the power of the court to reach evidence were limited to that district or 100 miles from the place of hearing, fugitives themselves could prevent the production of much incriminating evidence simply by keeping the necessary distance between themselves and the evidence.

It is far from clear that the banks or the depositors could assert the 100-mile objection, if the subpoena had been issued under Rule 45. The limitation imposed by that Rule is upon "a subpoena requiring the attendance of a witness at a hearing or trial . . ." It seems probable that the purpose of the rule is and always has been not to fix a limit to the reach of court process so much as to limit the distance of travel, and hence the burden and inconvenience, of the witness. See, for example, Section 6, Act of March 2, 1793, 1 Stat. 335. Against this purpose, the terms of the subpoenas of Judge Mathes are significant. They do not require the witnesses to attend court in Miami,

but give them the option of making the documents available to counsel at a time and place of convenience, in lieu of appearance in court. Indeed, the Hibernia Bank took advantage of this provision of the subpoena and obviated the necessity of appearance in court. Consequently, if a journey of more than 100 miles is required of officials of the respondent banks, it is only because they have declined the means extended to them to avoid this inconvenience, and any consequent burden is self-inflicted.

So far as the depositors are concerned, nothing is required of them, and they can have no standing to complain that a journey of more than 100 miles is required of an official of the bank.

III

THE DEPOSITORS CAN ADVANCE NO GROUND TO QUASH THE SUBPOENAS

The depositors do not have any legally protected interest to assert as ground for a motion to quash. The Court of Appeals apparently decided that they have, in the face of one of its own decisions and numerous decisions of other circuits.

Naturally, the depositors would prefer that their bank records not be subpoenaed, and that their financial transactions there recorded should not be disclosed. Nevertheless, one's preference for the obscurity of one's financial transactions does not provide a reason to quash a subpoena, but must yield to the common interest in disclosing the truth to serve the ends of justice. See *United States* v. *Bryan*, 339 U.S. 323, 331; 8 Wigmore, *Evidence* § 2192 (3d ed. 1940).

Certainly the depositors may not interpose any objections to the relevance of the evidence to which the subpoenas were directed, since relevance is governed by the issues between the parties, and is properly the concern of the parties alone. This well-settled rule has been applied by the federal courts to the standing of the witness himself to question relevance, and must be applied all the more forcefully to a depositor who is not a witness, but a stranger to the proceeding. 8 Wigmore, *Evidence* § 2210 (3d ed. 1940); *Shepherd* v. *Castle*, 20 F.R.D. 184 (W.D. Mo. 1957). See *Schutte & Koerting Co.* v. *Fischer & Porter Co.*, 6 Fed. Rules Serv. 45b.413, Case 2, at 522 (E.D. Pa. 1942); *United States* v. *Terminal R. Ass'n of St. Louis*, 148 Fed. 486 (E.D. Mo. 1906).

Moreover, the depositors have no property interest in the records—no custody, ownership or control. The records are in the possession, and are the property, of the banks. They do not belong to the depositors in any sense, so federal courts have repeatedly held. *Foster* v. *United States, supra* at 187-88; *Zimmerman* v. *Wilson, supra; United States* v. *Peoples Deposit Bank & Trust Co., supra* at 723-24; *In re Upham's Income Tax*, 18 F. Supp. 737, 738-39 (S.D.N.Y. 1937); *Cooley* v. *Bergin*, 27 F.2d 930, 932, 933 (D. Mass. 1928); *cf. United States* v. *First Nat. Bank of Mobile*, 295 Fed. 142, 143 (S.D. Ala. 1924), *affirmed per curiam*, 267 U.S. 576. See also *McMann* v. *SEC, supra* at 378-79. It is firmly established that a depositor is merely a creditor of a bank. *E.g., Bank of the Republic* v. *Millard*, 10 Wall. 152; *Ross* v. *Knott*, 13 F. Supp. 963, 965 (N.D. Fla. 1936), *affirmed*, 8 F.2d 817 (5th Cir. 1937), *affirmed, sub nom. McNair* v. *Knott*, 302 U.S. 369;

Calamita v. *The Tradesmens Nat. Bank,* 135 Conn. 326, 64 A.2d 46, 48-49 (1949); *Benge* v. *Michigan National Bank,* 341 Mich. 441, 67 N.W.2d 721, 723 (1954).

The claim of privilege (see briefs in the Court of Appeals of Fortunato Herrera and Pedro Gutierrez Alfaro, R. 382-83, 583) by a bank depositor or broker's customer is not a novel claim and federal courts of appeals have had several opportunities to make it very clear that there is no such privilege against the subpoena power of the court. Square decisions on this point have been rendered by the Court of Appeals for the District of Columbia, and by the Second, Fifth and Seventh Circuits. *Bowles* v. *Shawano Nat. Bank, supra; Societe Internationale* v. *McGranery, supra* at 443; 8 Wigmore, *Evidence* § 2286 (3d ed. 1940). Limburg, *The Bankers' and the Brokers' Privilege,* 25 Colum. L. Rev. 152, 154-95 (1925); *cf. McMann* v. *SEC, supra* (denying privilege claimed by broker's customer). *Falsone* v. *United States, supra* at 739-42.

A bank's records of the account of a depositor are, of course, to be distinguished from bank records in which the government of the United States has a property interest and a privilege arising from specific statutory provisions. See *Overby* v. *United States Fidelity and Guaranty Company,* 224 F.2d 158 (5th Cir. 1955). In this present case there is no statute under which a privilege can be claimed.

CONCLUSION

The questions of judicial power and the manner of its exercise, passed upon by the court below, are important and unsettled questions that will recur in the present extradition case and in cases arising in the future under similar treaties and the extradition

statute, until definitively decided by this Court. The decision below clearly runs contrary to the Treaty with Venezuela and to the act of Congress governing extradition, and it places an unwarranted limitation upon the all-writs act as interpreted by this Court. The Court of Appeals rejected the representations of two national governments, without any statement of the reasons for its decision, in a case of great public controversy in which are involved the political relations of the United States with Venezuela and with many other American republics. We urge the Court, therefore, to grant the writ of certiorari and reverse the judgment below.

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